

REBUTTAL OF OPPONENT TESTIMONY ON SB 240

By Russ Doty for Senator Lynda Moss

1. SB 240 addresses the problem arising when a regulated utility has received more in revenue from its "ownership charge" than needed to recover the original cost depreciated plus a reasonable rate of return on street lights.

SB 240 creates a mechanism where those taxpayers who actually pay the bill for street lights have a right to do something to lower it, namely petition for more efficient, longer lasting lights.

NorthWestern Energy opposed SB 240, claiming, "...[W]hat it [the ownership fee] really is, ... it's really a rental." NorthWestern contends that after street lighting infrastructure is paid for the utility continues "renting" it to Montana cities and their taxpayers.

Response: Nothing in the street lighting tariffs that NorthWestern Energy proposed to the PSC and the PSC approved contains the word "rental." NorthWestern poles and wires are not "rented" to customers. They come out of the rate base when they are paid for. This does not happen with street lights because NorthWestern has not matched its depreciation schedule with the street light revenue its street light tariff generates.

Even if Northwestern's lease argument is accepted arguendo, one would note that a good landlord puts in a new carpet and repaints once in a while. However, Northwestern refuses to upgrade to energy efficient street lights, thus preventing lower costs for those paying the bill.

If Northwestern rented a building where the rent was too high, it would soon find cheaper space. However, Montanans cannot go to another "landlord" for street lights once they discover the overcharge that NorthWestern is now calling street light "rent." Why? Because Northwestern is a regulated monopoly. Rate restrictions set by the PSC apply, just like housing authorities have rules to prevent rent gouging.

Except in this case so far, the PSC has missed the problem caused by street light overcharges.

NorthWestern submitted a document entitled "Guide to Understanding Street Lights" to the Senate Local Government Committee. It was not drafted by an attorney. Yet it opines on a legal issue. That "Guide" reads, "Utility owned street lights ... are ongoing lease light type installations." That wording contradicts NorthWestern's April 2008 analysis by the same author. The earlier memo differentiated "Utility Owned Street Lights" from "Private Leased Lights." It specifically said the latter "are not street light districts." Its April 2008 admission binds NorthWestern to the concept that the street lighting contracts it has with Montana cities are not leases.

Further, a computer search of all the street lighting contracts between Northwestern Energy and the City of Billings that were provided by the City reveals that the word

"lease" does not appear in any of them. Likewise, similar searches found that the contracts did not contain the words "rent," "renter," "lessee," "lessor," or "landlord." Indeed,

NorthWestern's sample Street Lighting Agreement, describes NorthWestern as an "independent contractor" and not a "landlord." Additional evidence exists that NorthWestern has not considered the street lighting contracts it has with Billings to be leases. NorthWestern signed a document entitled "SECOND MAINTENANCE CONTRACT EXTENSION AGREEMENT" for SILMD 97 in Billings. A maintenance contract is clearly not a lease.

Also, several years ago Billings attempted to levy a franchise fee on NorthWestern and other utilities as "rent" for a public utility's occupation of the City's right-of-way. Montana's Supreme Court ruled the City couldn't impose the fee. See *Montana Dakota Utilities Co., et al v. City of Billings*, 318 Mont. 407, 80 P.3d 1247; 2003 MT 332 (2003). While the facts are different in this instance (where the utility rather than the City is attempting to rely on the "rent" argument), it would be hard to imagine that the Court would not defeat the "rent" analogy in both cases.

If the contracts with no mention of lease in them were in fact leases, it would be more appropriate to consider them to be lease-purchase agreements. Why? Because Pursuant to effective original cost depreciated rate regulation, once utility property is fully depreciated, it drops out of the rate base and the utility no longer earns a rate of return on it. That is, the property has been effectively purchased by the consumer who no longer has to pay more than it originally cost plus a reasonable rate of return for it.

2. While opposing SB 240 NorthWestern, MDU and WETA contended that requiring use of NorthWestern poles to house more energy efficient lighting was impermissible confiscation of private property.

Response: SB 240 clearly provides for complete recovery of a utility's street light investment plus an allowed rate of return on utility property. Further, SB 240 allows the PSC to establish rates for the use of NorthWestern poles if the rate is justified under PSC statutes. That is not confiscation.

In addition, during his eminent domain testimony the NorthWestern lobbyist told this legislature that as a regulated monopoly NorthWestern was required to grant the use of its poles and wires (i.e., its private property) to competing entities. Thus NorthWestern's witness's prior admission binds him here as proof that his confiscation contention is without merit.

Utilities do not get to preserve their monopoly position of serving street lights they own and of charging unjust rates for that service by refusing to let local governments put luminaires that use less energy than the ones provided by the utilities on their poles and other street lighting infrastructure. In *Ottertail v. US*, the utility was prevented by the US Supreme Court's interpretation of anti-trust law from preventing municipalities it formerly

served from establishing their own electric system because Ottetail would not allow the use of its power lines to deliver electricity from the Bureau of Reclamation to the newly formed municipal utilities.

In threatening to take its "toys" and go home to preserve its monopoly position, Northwestern is preventing Montana cities from lower light bills in affected street lighting districts by an average of 82%--a clear per se violation of the Sherman Act, 15 U.S.C. § 2 -- anti-trust law established in the Ottetail cases. Such a reduction in costs would occur if local governments were allowed to use their own energy-efficient luminaires rather than the luminaires provided by NorthWestern.

The requirement that utilities allow others to use their infrastructure has been long established in other contexts as well. For example, Sprint is allowed to completing phone calls over AT&T or Qwest lines and vice versa. Cable companies have been allowed to use poles constructed by other utilities.

3. NorthWestern claimed that paying the utility what it characterizes as "rent" is "... not such a bad deal for communities because as long as you continue to pay that fee, you have perpetual maintenance and replacement of the capital facilities at no expense."

Response: Not true. NorthWestern's Street Lighting Contracts require cities to reimburse NorthWestern for the cost of repairs in addition to maintenance fees assessed. Section 6 of those contracts provides that Northwestern is not liable for damage caused by windstorms, fires or other acts of nature. Section 5, subparagraph (b) makes the City liable for extraordinary repairs like when a drunk takes out a pole or when (as has happened several times in Billings SILMD # 251 on Aronson) someone shoots out a light. The engineer in Benton Harbor, MI likes LEDs because if one of the points of light gets shot out, the others brighten up and the street light keeps shining.

4. NorthWestern asserted "Mr Doty's contention is the utility should basically take the ownership fee off the books once the lights are paid for."

Response: Correct.

5. NorthWestern continued, "Well the ownership fee is more than that. It pays for the ongoing maintenance of these facilities as well as any capital replacement."

Response: Incorrect. The ownership fee does not pay for ongoing maintenance. In addition to special assessments to pay for damage, and in addition to the ownership fee, NorthWestern's street light bills to the cities have a monthly maintenance charge of approximately 54 cents per street light and a monthly operations charge of 56 cents per street light. Further, the ownership fee does not pay for capital replacement. If there is a capital replacement or upgrade of facilities, a new calculation is done based on the cost of the new street lighting infrastructure and that number determines what the new ownership fee is. If rates prior to the replacement have not already covered the cost of the old infrastructure, then the remaining cost to be recovered is also added in so the utility remains whole.

6. NorthWestern claimed it would be costly and cumbersome to get government out of the business of performing the billing function for regulated utilities.

Response: The names of property owners now billed twice a year can be easily pulled from a database. Those folks are the ones who will continue to be billed. The utility can easily run a computer match to see which of those names and addresses are also being billed for electricity and add a few lines to the bill for those folks appropriately. If a property owner is not already being billed, a bill would be prepared for him or her as well.

Renters will not be billed. So, the cost of a light in front of an apartment house will not be divided 60 ways and a bill sent to the apartment house tenants as NorthWestern incorrectly stated. Now property owners in a lighting district are assessed for street lights regardless of whether or not the physical pole location is in front of that owner's property. The assessment is based on the number of property owners in the district and the value of the home and property. The initial assessment for each parcel of property and the number of property owners assessed will remain the same. The bill to cover that assessment will be sent to the same property owner by the utility that owns the poles and lights rather than by the government.

If SB 240 passes, a home owner who is now paying property taxes will still write two checks—one to pay the utility bill and one to pay taxes. The only difference is the tax bill will be smaller and the utility bill larger. However, after the ownership charge is eliminated and energy efficient lights paid for in 3 to 6 years, the combined bills will be lower by \$80 to \$200 a year depending on property and home size in lighting districts where NorthWestern owns the street lights.

So SB 240 empowers property owners to make the determination about whether any slight billing cost to individuals will be worth the change and whether eliminating the ownership overcharge and cutting nighttime energy use in half will save home owners much more than any slight increase in billing cost.

7. NorthWestern claimed, "This bill is not about local control of streetlights. Municipalities have complete control over street lights today."

Response: The members of street lighting districts do not have complete control over the kind of lights that serve them or the rate charged for that service. The PSC has ruled that property tax payers in and out of street lighting districts don't have standing to challenge rates or seek more efficient service. And contrary to what other utilities in the US are allowing, Montana property owners in lighting districts may not use poles they have paid for to connect lights that use half the energy because NorthWestern won't let them do that. So SB 240 preserves and enhances local control by extending control to lighting district property owners when their local governments won't act.

8. NorthWestern complained that SB 240 doesn't apply to electric cooperatives like Flathead Electric.

Response: US electric cooperatives are facilitating rather than hindering the transition to efficient street lighting. For example as was indicated, every street light in Ouray, Colorado is LED. And Tri-State Electric Generation and Transmission which serves from Montana to New Mexico has LED lighting in its large parking lot. Further, the city of Billings has a contract with Yellowstone Electric for one lighting district, SILMD # 299. Unlike NorthWestern's contracts, that contract provides that the city will own the lights when they are paid for. Flathead Electric is not denying use of its poles to anyone wishing to use them for more efficient lights. So the electric cooperatives know it is good public policy to refrain from overcharging patrons and to comply with the Ottertail Power rulings and do not have to be included in this bill.